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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 75

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLANT'S REPLY BRIEF.

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CORRECTION OF APPELLEE'S STATEMENTS OF FACTS.

We regret the necessity of pointing out certain inaccurate statements in Appellee's brief, of facts crucial to the issues in this appeal.

On page 12 of Appellee's brief it is stated:

> "Neither are sales made in Ohio [included in Ohio business] if the products sold are shipped in furtherance of such sales from out of the state factories and warehouses."

and on page 16:

> "It [Ohio] has excluded all Ohio sales where the goods sold are shipped into Ohio from other states."

Appellee in its brief before the Supreme Court of Ohio made the same contention. Appellant pointed out in the court below that there was no shred of evidence to support Appellee's statement, and that the direct, uncontradicted evidence was to the contrary. Yet Appellee brings up the point now once more. Not a single citation from the Record is offered in its support, and we respectfully submit that there is no evidence whatsoever in the Record in support of Appellee's statement. It is directly contrary to the testimony of Charles L. Johns, Auditor of Tax Returns of Appellant. Moreover, it is flatly opposed to the findings of the Board of Tax Appeals.

Mr. Johns was asked:

> "Q. I will ask you next if, in arriving at the assessments involved in this appeal, any deduction has been made for the value or amount of goods manufactured outside of Ohio—by the company outside of Ohio—and shipped direct to Ohio buyers on sales made by Ohio branches?
>
> "A. No, sir." (R. 20.)

This testimony was introduced by Appellant. Appellee introduced no evidence to the contrary. In Appellee's brief before the Board of Tax Appeals this testimony was not questioned.

Moreover, in the decision of the Ohio Board of Tax Appeals, the Board found as follows:

> "In determining the value of business done in Ohio during the remaining years, [namely 1936 to 1939 inclusive], the tax commissioner used the value of the sales of all goods manufactured in Ohio, sold and delivered within and without the state, plus the value of the goods manufactured outside Ohio and sold to Ohio customers." (R. 71.)

The Ohio Board of Tax Appeals also stated that:

> "All of the goods which were manufactured out of the state and sold to Ohio customers were shipped on orders received from appellant's branches which it maintained in Ohio, and the board finds that the activities of such branches in this state and their authority in connection therewith constitute doing business within the state regardless of whether such goods were shipped to warehouses of the appellant within the state or directly to customers in Ohio on orders from the branches." (R. 74.)

Again, the Ohio Board of Tax Appeals found that:

> "the action of the tax commissioner in including in the numerator of the business fraction the value of all sales of goods manufactured outside of Ohio to customers in Ohio was proper, and the same hereby is affirmed." (R. 76, lines 3-7.)

The Supreme Court of Ohio affirmed in all particulars the decision of the Board of Tax Appeals.

Appellee also suggests on page 17 of its Brief that the Board of Tax Appeals may have given Appellant undue credit for Springfield trucks shipped to branches in other states and sold from the branch house floors. Appellee's brief states that:

> "some of the warehouses which received the 62% of the output of appellant's Ohio factories were Ohio warehouses and to this extent should not have been excluded (R. 45)."

But the sales by Ohio branches of Springfield trucks were not excluded under the decision of the Board of Tax Appeals. In arriving at the 62% figure, all shipments of Springfield trucks to destinations in the United States were considered in order to ascertain the percentage shipped to branches and the percentage shipped to dealers and users everywhere in the United States, but the resulting 62%

is to be applied only to the shipments of Springfield trucks to points in the United States, outside of the State of Ohio. The decision of the Ohio Board of Tax Appeals explicitly provided that:

> "the board finds that in each of the years 1936 to 1939, inclusive, 62% of the sales of goods manufactured in Ohio and sold to customers in states other than Ohio was sold from warehouses outside the state and, therefore, should be excluded from the numerator of the business fraction in determining the base for the purpose of computing the franchise fee for the years 1937 to 1940, inclusive, and in this respect the action of the tax commissioner is modified." (R. 79.)

On Appellant's returns it included all sales by its Ohio branches to Ohio buyers of Springfield motor trucks, Paragraph 11, column B (R. 69); and paragraph 12, "Total sales in Ohio per return." (R. 69.) Having already been included as a measure of the tax in Appellant's returns, such Ohio sales of Springfield trucks will necessarily be included in the final measure of the tax. In short, they are in no way affected by the 62% exclusion.

Due Process of Law.

Appellee's brief avoids meeting the exact issue of the denial of due process of law raised by Appellant. Of course Ohio may impose a franchise tax on Appellant for the privilege of doing local business in Ohio, and under a constitutionally valid tax Ohio may within reason make the amount of the tax relatively high or low, depending only on the rate of tax imposed. But Ohio must impose a tax founded upon a valid constitutional basis, which it has failed to do. Ohio's franchise tax formula employs in the numerator of the business done fraction both Ohio *sales* and Ohio *manufacturing* activity while including only total *sales* everywhere in the denominator. Such an unbalanced formula

necessarily results in attributing to Ohio an excessive and arbitrary proportion of Appellant's capital stock value.

If Ohio may thus use a distorted business done fraction, so may every state in which Appellant does business, with the result that more than 100% of Appellant's capital stock value would be taxed in the several states. The fact that Ohio may impose a franchise tax upon a proper formula, and perhaps collect an even greater tax, will not validate its use of a formula which is found to be unsound if all the states should attempt to use it. If Ohio may use the formula adopted in this case, then every state may arbitrarily measure its franchise tax by any kind of extrastate or interstate activity or property, so long as the same amount of tax could be imposed by the use of a proper measure.

The position of Appellee is inconsistent and indefensible. Ohio seeks to include in business done in Ohio both sales by Ohio branches of goods shipped direct from factories outside Ohio to buyers in Ohio, and also sales by branches outside Ohio of Springfield trucks shipped direct from Springfield to buyers in other states. Both of these classes of sales simply cannot be Ohio business.

Ohio is attempting to use as the measure of Appellant's franchise tax, sales of Springfield trucks which when made by branches in ten other states,[1] which levy franchise taxes on the Appellant, are used as a measure of those franchise taxes. When sales of Springfield trucks, used as a measure of Appellant's Ohio franchise taxes, are made by its branches in thirty-one states and the District of Columbia,[2] which impose income taxes on the Appellant, the same sales are used as a measure in determining Appellant's income taxes in those jurisdictions. Finally, sales of Springfield

1. See Appendix A.

2. See Appendix B. In Appellant's brief the number of franchise tax states was inadvertently given as 9 and the number of income tax jurisdictions as 32 states and the District of Columbia, instead of the correct number given above, namely 10 franchise tax states and 31 income tax states and the District of Columbia.

trucks which Ohio is attempting to use as a measure of Appellant's Ohio franchise taxes, are subject to direct sales and gross receipts taxes when made in still other states. The simple fact is that these sales are not Ohio sales or Ohio business done; they were effected and handled from first to last by branches outside Ohio; and for Ohio to attempt to measure its tax by such out-of-state sales is "to project its powers beyond its boundaries" and to tax extra-territorial values by attributing an excessive proportion of *Appellant's capital stock value to Ohio. This is a denial of* due process of law.

Violation of the Commerce Clause.

Appellee relies solely on the earlier decisions of this Court in which the question of the actual imposition of multiple tax burdens on interstate commerce was not and could not be raised. Appellee can cite no decision of this Court upholding the validity of corporate franchise taxes imposed by two or more states and measured by the same receipts derived from interstate sales. In this case, that issue is squarely presented for the first time to this Court.

Ten states[3] in which Appellant does business measure their corporate franchise taxes by the receipts from sales made by Appellant's branches in those states, including sales of goods manufactured at Appellant's Springfield plant, and shipped direct from the Springfield plant to the buyers outside Ohio.

Thirty-one states and the District of Columbia[4] measure their net income taxes imposed on Appellant by the same sales of Springfield trucks in those taxing jurisdictions which the Tax Commissioner has included as Ohio business in the assessments here involved.

Under the decision of this Court in *International Harvester Company* v. *Department of Treasury, et al.*, 322 U. S.

3. See Appendix A.
4. See Appendix B.

340, the same sales are subject to direct sales and gross receipts taxes in all states where Appellant's selling branches and the buyers are located.

Now, Ohio seeks to use the same receipts from out-of-state sales as the measure of its franchise tax assessed against Appellant. This, we submit, is indeed multiple taxation of interstate commerce and so burdens interstate commerce as to constitute a regulation thereof. Either the Ohio tax, in the instant case, places a prohibited burden on interstate commerce, *or* the commerce clause of the Constitution no longer places any restriction on the rights of the states to impose duplicate and multiple tax burdens on commerce among the states.

This Court in holding that state taxes did not violate the Commerce Clause has frequently made the point that there was no showing of double taxation. Here we have a definite showing of double, indeed, of multiple taxation. If the fact that there is a lack of double taxation is an argument for sustaining a tax, it would certainly seem that the presence of double or multiple taxation should be a conclusive argument for invalidating a tax.

Respectfully submitted,

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APPENDIX A.

State Franchise Taxes Measured by Receipts from Sales of Trucks Shipped From Appellant's Springfield Plant.

Illinois, Smith-Hurd Ann. Illinois Statutes, Permanent Edition, Chapter 32, Sec. 157.136 *et seq.*

Kansas, General Statutes of Kansas, 1935, as amended, Sec. 17-702. Annual License Fee.

Kentucky, Kentucky Revised Statutes, 1942, Sec. 136.070. Corporation License Tax.

Louisiana, Dart's 1939 Code, as amended, G. S. 1399, Sec. 8723.

Mississippi, Mississippi Code of 1942, Secs. 9314, 9319.

North Carolina, General Statutes of North Carolina, 1943, Ch. 105, Sec. 105-122.

Oklahoma, Oklahoma Statutes, 1941, Title 68, Ch. 17, Sec. 638. Annual License Fee.

Pennsylvania, Purdon's Pennsylvania Statutes, Ann., 72 P. S., Sec. 1871.

Texas, Vernon's Texas Statutes, 1936, Secs. 7084-7097.

Washington, Remington's Revised Statutes of Washington, Sec. 3836-5. Annual License Fee for Foreign Corporations.

APPENDIX B.

State Income Taxes Measured by Receipts From Sales of Trucks Shipped From Appellant's Springfield Plant.

Alabama, Code of Alabama 1940, Title 51, Ch. 17, Income Taxes, Sec. 402(12).

Arizona, Arizona Code of 1939, Sec. 73-1524.

Arkansas, Pope's Digest of the Statutes of Arkansas, 1937, Sec. 14,038.

California, California Statutes of 1929, Ch. 13, as amended, Sec. 10. Bank and Corporation Franchise Tax, based on income.

Colorado, Colorado Laws of 1937, Ch. 175, Sec. 17.

Connecticut, General Statutes of Connecticut, Revision of 1930, as amended, Cum. Supp. 1935. Sec. 420c. Corporation Business Tax, based on income.

Georgia, Georgia Code of 1933 as amended, Ch. 92-3113.

Idaho, Idaho 1932 Code, Sec. 61-2416.

Iowa, Code of Iowa 1939, Ch. 329.3, Sec. 6943.065.

Kansas, General Statutes of Kansas, 1935, as amended, Sec. 79.3218.

Kentucky, Kentucky Revised Statutes, 1942, Sec. 141.120.

Louisiana, General Statutes of Louisiana 1939, Sec. 8587.34.

Maryland, Ann. Code of Maryland (1939 Edition), Art. 81, Sec. 253.

Massachusetts, General Laws of Massachusetts, Ch. 63, Sec. 38. Business Excise Tax Bases on Income.

Minnesota, Mason's Minnesota Statutes, 1927, 1938 Supp., Secs. 2934-25.

Mississippi, Mississippi Code, 1942, Title 36, Sec. 9231.

Missouri, R. S. Missouri 1939 as amended, Sec. 11343.

Montana, Rev. Codes of Montana, 1935, Sec. 2297.1. Corporation License Tax based on income.

New York, New York Tax Law. Art. 9-A, Sec. 214. New York Franchise Tax based on income. (As in effect for 1936-1939 inclusive. Repealed by Ch. 415, Laws 1944, effective March 31, 1944, and replaced by the present Art. 9-A.)

North Carolina, General Statutes of North Carolina, 1943, Ch. 105, Sec. 105-134.

North Dakota, Rev. Code of North Dakota, 1943 as amended, Sec. 57-3813.

Oklahoma, Oklahoma Statutes, 1941, Title 68, Ch. 21, Sec. 878.

Oregon, Oregon Compiled Laws Ann. as amended, Ch. 15, Sec. 110-1507. Corporation Excise Tax based on income.

Pennsylvania, Purdon's Pennsylvania Statutes, Ann., 72 P. S., Sec. 3420(b).

South Carolina, Code of Laws of South Carolina 1942, Civil Code, Title 25, Ch. 107, Sec. 2451.

South Dakota, South Dakota Code of 1939, Ch. 57.27, Sec. 57.2707.

Tennessee, 1932 Code of Tennessee, Sec. 1316. Corporation Excise Tax based on income.

Utah, Utah Code Ann. 1943, as amended, Title 80, Sec. 80-13-21. Franchise tax based on income.

Vermont, Public Laws of Vermont 1933, Secs. 888, 894. Corporation Franchise Tax based on income.

Virginia, Tax Code of Virginia (1936) as amended, Sec. 54. Virginia Code of 1942.

Wisconsin, Wisconsin Statutes, Ch. 71, Sec. 71.02(3).

District of Columbia, District of Columbia Code, Title 47, Ch. 15, Sec. 47-1504.